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HOY PAK KWAI

v.

LEONG KON FAH & ORS

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COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
JAMES FOONG JCA
ZULKEFLI AHMAD MAKINUDIN JCA
[CIVIL APPEAL NO: S-02-1353-04]
17 NOVEMBER 2006

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COMPANY LAW: *Members' rights - Oppression - Whether member discriminated against or otherwise prejudiced by acts of majority shareholders - Whether allegations of oppression proven - Whether company ought to be wound-up or majority shareholders ordered to buy member's share at market price - Companies Act 1965, s. 181*

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This was an appeal by the appellant against the decision of the High Court dismissing his originating petition in the matter of s. 181 of the Companies Act 1965. The appellant held 600,000 fully paid up shares in a company known as Aerial Product Industries Sdn Bhd ('API'), a manufacturer of industrial gas. This number of shares represented 40% of the total shareholding in API. The 1st and 2nd respondents were also shareholders of API, each holding 300,000 and 600,000 fully paid up shares respectively, representing 20% and 40% respectively of the total shareholding of API. The appellant, frustrated over his inability to rid the 1st and 2nd respondents as directors of API and failing to convince them to buy over his shares in the company, launched this action against them. The appellant claimed that he, as a member of API, had been oppressed and his interest disregarded. He also alleged that he was discriminated against or otherwise prejudiced by the acts of the 1st and 2nd respondents. Specifically, he averred that: (i) there was a visible departure from the standard of fair dealing and violation of the conditions of fair play as there was no formal disclosure by the respondents until 10 April 2000 that they had incorporated a company known as Acoxgas Sdn Bhd ('Acoxgas'), which was in direct competition with API; (ii) one Malaysia Workshop (a company owned by both respondents) had been utilizing API's rejected industrial gas and not paying for it; (iii) a payment amounting to RM400,000 to Malaysia Workshop was unsupported by convincing evidence to justify it; (iv) the 1st and 2nd respondents had reduced the price

of API's products under the pretext of a price war with other competitors in order to assist Acoxgas penetrate the Sabah market; (v) the 1st and 2nd respondents passed board resolutions in which they had personal interests in API despite his objections, thereby breaching their fiduciary duty to act in API's best interests; and (vi) that API had suffered financial losses as a result of mismanagement by the respondents. The appellant also accused the learned trial judge of not taking into account the fact that mutual confidence between the parties had broken down, warranting that either API be wound-up or that the respondents be ordered to buy the appellant's share at market price.

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Held (dismissing the appeal)**Per James Foong JCA:**

- (1) Indeed, the 1st and 2nd respondents did not formally disclose their interest in Acoxgas to API until 10 April 2000, but things in this company were not run in a manner that took pains to comply with every formality required by law. This relaxed attitude was also reflected in the appellant's non-disclosure of his interest in one Tawau Oksigen Plant Sdn Bhd. From the business culture of the parties involved in API, it was their practice to be separately engaged in other business of their own which may even conflict with that of API as long as they were honest with each other in their dealings. Before the entry of the appellant into API, this practice went on smoothly. API made profits for them and there was no quarrel among themselves, but the moment this fundamental trust was questioned and when one party started to dig into the affairs of the other, then this entire culture collapsed. For the appellant to accuse the 1st and 2nd respondents of impropriety and lack of fair play was totally unfair and unacceptable, especially when there was no cogent evidence to support this claim. (paras 50 & 51)
- (2) The 1st respondent had insisted in his testimony that for his *de bono* services to API, the directors of API had agreed to allow him to channel this rejected gas to Malaysia Workshop for free. This claim was justified, particularly when this gas had no commercial value to API. If it were not given to Malaysia Workshop, then API would have released it into the atmosphere to evaporate. This could neither be viewed as oppressive to the appellant nor that he was being discriminated and prejudiced against. (para 54)

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- A (3) Upon examination of the board minutes of API referred to
by the appellant and the bills tendered by Malaysia
Workshop, it was true that some of those bills did not
correspond with the jobs as minuted by the API board. But
nowhere did Malaysia Workshop ever state that those bills
B were only for jobs stated in the minutes. Those bills were
for all works that were duly rendered by Malaysia Workshop
for API. The appellant had never disputed such services as
having been rendered nor those stated in other bills for
materials and services other than those mentioned in the
C minutes. As those bills were legitimate, they ought to be
paid. (para 57)
- (4) In a price war among competitors, one manufacturer would
be better off than the other if its manufacturing cost is lower
than his competitors. Unless there was proof to substantiate
D this, rather than just a mere comment by the appellant that
Acoxgas had produced its product at a lower cost than API
or other manufacturers of the same product, the appellant's
accusation could not be sustained. Then, one must not
E overlook the ability of financially stronger competitors to
withstand long periods of price reduction in order to kill off
their competitors who are financially weaker, despite the fact
that they themselves are losing money. So, there were many
F factors to consider in a free market situation before one
could say that Acoxgas had benefited from this price war.
And in the absence of a conclusive study that despite these
influencing factors Acoxgas had benefited from this situation,
the appellant had not proved this point against the
respondents. Besides, the 1st respondent had provided a
G logical explanation of why this policy reduction was practised
ie, it was necessary for API to maintain its market share if
API wished to compete with other producers who were
dropping their prices. (para 60)
- H (5) The resolutions passed by the respondents were indeed in
retaliation to the appellant's acts, but they were not done
mala fide. From the inception of API up to the time when
the appellant participated in the company's affairs, the
working relationship of the then directors was cordial, relaxed
and casual, and this had worked out well for all as could be
I seen from API's profitable returns. In this spirit of give and
take, many things were carried out either free of charge or

below cost. But when the appellant began to upset the norm and, worse, question the integrity and probity of the respondents when they were honest and had faithfully contributed to the company, then it was only natural that they retaliated by claiming and charging whatever that was rightfully due to them. This was legitimate and the acts of the respondents did not constitute oppression. (para 65)

(5a) The appellant's claim of there being a breach of fiduciary duty was absurd. As correctly pointed out by the trial judge, the 1st and 2nd respondents were substantial shareholders and directors of API. They owed no fiduciary duty to the appellant in exercising their vote at board meetings and as shareholders they owed no duty to anybody as to how they exercised their vote. The mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which other members of the board or shareholders oppose, would not in general constitute oppression. For a petition to succeed, it must be shown that there has been oppression in a real sense of members *qua* shareholders, and not merely a subordination of their wishes to the power of the voting majority. (paras 66)

(6) On the facts, the company's losses for the periods stated by the appellant were, to a very large extent, contributed to by the actions of the appellant himself. When this was a fact, then the appellant could not turn around and blame the 1st and 2nd respondents. The 1st respondent also disclosed other contributing factors to the losses, which were legitimate reasons where no fault could be attributed to the 1st and 2nd respondents as executive directors of API, least of all utilizing their position to oppress the appellant, to disregard his interest as well as to discriminate against or otherwise prejudice him. (paras 68, 69 & 70)

(7) Although the appellant had lost confidence with the 1st and 2nd respondents and *vice versa*, the substratum of the company was still intact. The company continued to operate as an entity separate and distinct from its shareholders. As an ongoing profitable enterprise, there was no reason why the court should order it to be wound-up or force one shareholder to buy out the other just because one did not like the other. Without the appellant as a director, API was, relatively speaking, well managed and this was manifested by

- A the rather substantial dividends dished out from time to time to shareholders for their investments. Under these circumstances, there was no justifiable reason why the court in exercising its judicial discretion, based on just and equitable rule, should accede to the appellant's demands,
- B particularly when there was cogent evidence that he did not come with clean hands. (para 72)

Bahasa Malaysia translation of headnotes

- C Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi yang menolak petisyen pemulanya dalam perkara s. 181 Akta Syarikat 1965. Payeru memegang 600,000 saham berbayar dalam syarikat yang dikenali sebagai Aerial Product Industries Sdn Bhd ('API'), sebuah syarikat pengeluar gas industri. Saham-saham ini bersamaan dengan 40% keseluruhan pegangan saham dalam API.
- D Responden pertama dan kedua adalah juga pemegang saham API, dengan masing-masing memegang 300,000 saham dan 600,000 saham, iaitu bersamaan dengan 20% dan 40% keseluruhan saham API. Payeru kecewa kerana gagal menyingkir responden pertama dan kedua sebagai pengarah API dan gagal meyakinkan mereka
- E untuk membeli saham-sahamnya, dan berikutnya memulakan tindakan di sini terhadap mereka. Payeru mendakwa bahawa selaku ahli API beliau telah ditindas dan kepentingan-kepentingan beliau tidak dipedulikan. Beliau juga mengatakan bahawa beliau telah didiskriminasi dan diprejudis oleh tindak tanduk kedua-dua
- F responden. Khususnya, payeru mendakwa: (i) kedua-dua responden tidak berlaku adil kepadanya dan telah melanggar kaedah-kaedah keadilan apabila tidak memberitahunya sehinggalah 10 April 2000 bahawa mereka telah mengambil-alih sebuah syarikat yang dipanggil Acoxgas Sdn Bhd ('Acoxgas'), yang merupakan
- G pesaing langsung API; (ii) sebuah syarikat, Malaysia Workshop (yang dimiliki oleh kedua-dua responden) telah menggunakan gas industri terbuang API tanpa membayar apa-apa baginya; (iii) bayaran berjumlah RM400,000 kepada Malaysia Workshop tidak disokong apa-apa keterangan kukuh untuk menjustifikasikannya; (iv)
- H bagi membantu Acoxgas menembusi pasaran Sabah, responden pertama dan kedua telah menurunkan harga barangan API atas dalih wujud peperangan harga dengan pesaing-pesaing; (v) responden pertama dan kedua meluluskan resolusi untuk manfaat kepentingan mereka di dalam API walaupun dibantah oleh payeru,
- I yang mana ini adalah bertentangan dengan tanggungjawab fidusiari mereka untuk bertindak demi kepentingan terbaik API; dan (vi) bahawa API telah mengalami kerugian kewangan akibat salah

pengurusan responden-responden. Perayu juga mendakwa bahawa yang arif hakim bicara tidak mempertimbang fakta bahawa pihak-pihak sudah tidak lagi saling percaya mempercayai, keadaan mana menuntut supaya API digulung ataupun responden-responden diperintah membeli pegangan perayu pada harga pasaran.

Diputuskan (menolak rayuan)
Oleh James Foong HMR:

- (1) Memang benar bahawa responden-responden pertama dan kedua tidak mendedahkan kepentingan mereka di dalam Acoxgas kepada API sehinggalah 10 April 2000, tetapi pengurusan syarikat ini tidak didasarkan atas pematuhan terperinci terhadap kehendak undang-undang. Sikap sambil lewa ini juga tercermin dari tindakan perayu sendiri yang tidak mendedahkan kepentingannya di dalam sebuah syarikat, Tawau Oksigen Plant Sdn Bhd. Dari cara pihak-pihak dalam API mengendalikan perniagaan mereka, jelas bahawa selagi mereka jujur bilamana berinteraksi sesama mereka, setiap orang bebas menjalankan perniagaan sampingan mereka masing-masing walaupun ia mungkin bertentangan dengan kepentingan API. Sebelum kemasukan perayu ke dalam API, amalan ini berjalan dengan baik. API memberikan mereka keuntungan dan tidak ada pergaduhan di antara sesama mereka. Namun, sebaik sikap saling mempercayai ini dipersoalkan, dan bilamana satu pihak mula menyelongkar perkara-perkara yang dilakukan oleh pihak lain, maka asas amalan dan budaya tersebut runtuh sama sekali. Oleh itu, adalah tidak adil bagi perayu menuduh responden-responden sebagai tidak berlaku adil atau telah melakukan penyelewengan, sementelah dakwaan sedemikian tidak disokong oleh apa-apa bukti kukuh.
- (2) Dalam keterangannya responden pertama bertegas bahawa sebagai balasan kepada khidmat *de bononya* kepada API, pengarah-pengarah API telah bersetuju untuk membenarkan beliau menyalurkan gas terbuang kepada Malaysia Workshop secara percuma. Dakwaan ini adalah berjustifikasi, terutama kerana gas tersebut sudah tidak bernilai kepada API. Gas tersebut perlu dilepaskan ke udara jika tidak disalurkan kepada Malaysia Workshop. Ini bukanlah perkara yang boleh dianggap sebagai menindas perayu, atau sebagai telah mendiskriminasi atau memprejudis beliau.

- A (3) Melihat kepada minit mesyuarat lembaga API yang dirujuk perayu serta bil-bil yang dikemukakan oleh Malaysia Workshop, adalah benar bahawa sesetengah bil tersebut tidak selaras dengan kerja-kerja seperti yang diminitkan oleh mesyuarat tersebut. Tetapi Malaysia Workshop tidak menyatakan bahawa bil-bil tersebut adalah untuk kerja-kerja yang tertera di dalam minit itu semata-mata. Bil-bil itu adalah untuk semua kerja-kerja yang pernah dibuat oleh Malaysia Workshop untuk API. Perayu tidak menyangkal perkhidmatan yang diberi ini, mahupun perkhidmatan-perkhidmatan lain yang tercatat dalam bil-bil lain selain dari bil-bil yang dikemukakan itu. Oleh kerana bil-bil tersebut sah, maka bayaran baginya harus dibuat.
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- D (4) Dalam peperangan harga antara pesaing-pesaing, seorang pengeluar akan mengalahkan pengeluar yang lain jika kos pengeluarannya lebih rendah dari yang lain itu. Perkara ini bagaimanapun perlulah dibuktikan, yang berakibat pengataan kosong perayu bahawa Acoxgas mengeluarkan produknya pada kadar kos yang lebih murah dari API atau lain-lain pengeluar produk yang sama tidak boleh dipertahankan. Selain itu, harus juga disedari bahawa pengeluar yang mempunyai kewangan yang lebih teguh boleh membunuh pesaingnya yang berkewangan lemah, walaupun mereka sendiri akan menanggung kerugian. Oleh itu, dalam dagangan bebas, banyak faktor yang perlu dipertimbang sebelum seseorang boleh mengatakan bahawa Acoxgas telah beroleh manfaat dari peperangan harga ini. Juga, dengan ketiadaan kajian yang menunjukkan bahawa Acoxgas masih lagi meraih keuntungan walaupun wujudnya faktor-faktor ini, maka dakwaan yang dibuat perayu terhadap responden jelas gagal dibuktikan. Selain itu, responden pertama telah memberi penjelasan logik mengapa polisi penurunan dilaksanakan, iaitu ianya penting bagi API mengekalkan paras pegangan pasarannya jika ingin bersaing dengan pengeluar-pengeluar lain yang telah menurunkan harga mereka.
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- I (5) Resolusi-resolusi yang diluluskan responden-responden, walaupun bertujuan membalas tindakan-tindakan perayu, tidaklah dibuat secara *mala fide*. Dari mula API ditubuhkan sehinggalah ke masa perayu mencampuri urusan syarikat tersebut, hubungan kerja di antara pengarah-pengarah adalah baik, releks dan bersahaja, dan ini memanfaatkan semua

- pihak sepertimana yang boleh dilihat dari keuntungan perniagaan yang dikecapi API. Dengan semangat tolak ansur ini, banyak perkara telah dibuat sama ada secara percuma ataupun di bawah kos. Tetapi sebaik sahaja perayu mengocak keadaan, dan lebih teruk lagi mempersoalkan integriti dan perkelakuan responden-responden walaupun mereka jujur dan terus menyumbang kepada syarikat, maka bukanlah sesuatu yang menghairankan apabila mereka bertindak balas dengan menuntut dan meletakkan harga atas apa yang menjadi hak mereka. Tindakan responden-responden ini adalah sah dan bukan satu penindasan.
- (5a) Dakwaan perayu bahawa berlaku pelanggaran tanggungjawab fidusiari adalah dakwaan yang dangkal. Seperti yang dikatakan dengan betulnya oleh hakim bicara, responden-responden pertama dan kedua adalah pemegang saham substantial dan pengarah-pengarah API. Mereka tidak memikul apa-apa tanggungjawab fidusiari terhadap perayu apabila mengundi di mesyuarat lembaga dan selaku pemegang saham mereka tidak bertanggungjawab kepada sesiapa tentang bagaimana hendak melaksanakan undian-undian mereka. Semata-mata menggunakan kuasa mengundi di mesyuarat lembaga atau di mesyuarat am bagi meluluskan resolusi yang ditentang oleh lain-lain ahli atau pemegang saham, pada kebiasaannya bukanlah penindasan. Untuk berjaya, sesuatu petisyen hendaklah menunjukkan penindasan dalam ertikata sebenar ahli-ahli *qua* pemegang-pemegang saham, dan bukan semata-mata penundukan kehendak mereka oleh kehendak pengundi majoriti.
- (6) Atas fakta, kerugian syarikat dalam tempoh yang dinyatakan perayu adalah sebahagian besarnya disebabkan oleh tindakan perayu sendiri. Berdasarkan fakta ini, perayu tidak boleh berpaling semula dan menyalahkan responden pertama dan kedua. Responden pertama juga mendedahkan faktor-faktor penyumbang lain, yang memangnya munasabah, dan kerana itu tiada kesalahan boleh diletakkan ke atas bahu responden pertama dan kedua selaku pengarah-pengarah eksekutif API, terutama dari segi dakwaan mereka menggunakan kedudukan mereka untuk menindas perayu, atau tidak mempedulikan kepentingan perayu atau mendiskriminasi dan memprejudiskannya.

- A (7) Walaupun perayu telah hilang kepercayaan terhadap responden pertama dan kedua dan begitu juga sebaliknya, substrata syarikat masih lagi kukuh. Syarikat masih berjalan sebagai satu entiti yang terpisah dari pemegang-pemegang sahamnya. Oleh kerana ia masih menguntungkan, maka tiada alasan bagi mahkamah memerintahkan penggulangannya, ataupun memaksa seorang pemegang saham untuk membeli pegangan pemegang saham lain disebabkan mereka sudah tidak suka menyukai. API, secara relatifnya, telah diurus dengan baik tanpa perayu menjadi pengarah, dan ini terserlah dari dividen besar yang dikeluarkan dari masa ke masa kepada pemegang-pemegang saham atas pelaburan mereka. Dalam keadaan sedemikian, tiada alasan munasabah mengapa mahkamah, dalam menjalankan budibicara kehakimannya, dengan berdasarkan kaedah keadilan dan ekuiti, harus tunduk kepada tuntutan perayu, sementelah terdapat keterangan kukuh bahawa beliau tidak datang ke mahkamah dengan tangan yang bersih.
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Case(s) referred to:

- E *Dato Toh Kian Chuan v. Swee Construction & Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730 (***foll***)
Ebrahimi v. Westbourne Galleries Ltd [1972] 2 All ER 492 (***refd***)
Re Harmer Ltd [1959] WLR 62 (***foll***)
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 2 MLJ 227 (***refd***)
- F *Re Tong Eng Sdn Bhd (Loh Loon Keng, Petitioner)* [1994] 1 MLJ 451 (***refd***)
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA (***refd***)

Legislation referred to:

- G Companies Act 1965, ss. 181, 218
For the appellant - Wong Kum Heng; M/s William Liaw Chan & Co
For the 1st & 3rd respondents - Jeyan Marimuttu; M/s J Marimuttu & Partners
- H *For the 2nd respondent - Gabriel Ho; M/s Gabriel Ho & Co*
Reported by Suresh Nathan

I

JUDGMENT**A****James Foong JCA:****Introduction**

[1] This is an appeal against the decision of the High Court at Sandakan which dismissed the appellant's originating petition in the matter of s. 181 of the Companies Act 1965.

B**Background & Complaints Of The Appellant**

[2] In order to understand the appellant's grievances, it is necessary to set out the facts of this case in detail.

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[3] The appellant is 40 years of age and holds 600,000 fully paid up shares in a company known as Aerial Product Industries Sdn Bhd (API), the 3rd respondent. This number of shares represents 40% of the total shareholding in API.

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[4] The 1st and 2nd respondents are also shareholders of API each holding 300,000 and 600,000 fully paid up shares respectively. These represent 20% and 40% respectively of the total shareholding of API.

E*Formation And Operation Of Api*

[5] API was incorporated in 1987 born out of an idea conceived at an informal tea session between the appellant's father. Hoy Egg Sun (Hoy), the 1st and 2nd respondents and another called Tan Chan Piao (who subsequently sold his shareholding in API to the 2nd respondent and therefore is not involved in this dispute). The objective of API was to set up a plant to manufacture industrial gas in Sandakan to cater to Sabah's needs.

F**G**

[6] Aside from Tan Chan Piao (who is no longer relevant) a little insight into the background of the parties behind the formation of API is necessary.

[7] The 1st respondent was 60 years of age around the time of the trial. He was educated in England with a mechanical engineering degree. Before venturing out on his own, he had extensive experience in operating palm oil mills.

H**I**

- A **[8]** The 2nd respondent around the time of trial was 68 years of age and is a mechanic with a comprehensive understanding of machines. He has set up a business called Malaysia Workshop to fabricate tanks, vessels and boilers as well as to undertake repairs on all sorts of engines.
- B **[9]** The 1st respondent after leaving his salaried job in 1983 joined the 2nd respondent as a partner in Malaysia Workshop. Hoy, in the meantime, was a steel supplier who came to know the 1st and 2nd respondents in the course of his trade.
- C **[10]** After forming API, these three business associates “in the time-honoured Chinese tradition of trust and mutual benefit and voluntary contribution for the well being of the company which typified their relationship and conduct of the affairs of the company” proceeded to set up a factory for their enterprise.
- D **[11]** At the beginning, the 1st respondent was assigned the task of securing relevant licences and permits for construction and operation of the plant. Hoy’s duty was to supply building materials for the plant and source relevant machinery from China. The 2nd
- E respondent with his knowledge of mechanics was entrusted with installing the machines and ensuring that they function properly at all times.
- F **[12]** Once the factory was in production, the 1st respondent managed the day-to-day affairs of the company without remuneration and the 2nd respondent looked after the operations of the factory. For this, he was paid a salary of RM3,500 per month. All major decisions of API were made by these three through informal consultation either over tea or by telephone. And
- G to ensure mutual benefits be extended to family members of the parties. Hoy recommended his son-in-law’s accounting firm to handle API’s secretarial and accounting duties and this was duly accepted by the other two members.
- H *Appointment Of Dealers*
- I **[13]** Since API’s core business was restricted to production, the retailing of its manufactured products was left to appointed dealers. But some of these dealers are closely associated with these three business associates. For example, Malaysia Workshop owned by the 1st and 2nd respondents was appointed a dealer. Then there was the appointment of Palucky where Hoy was the proprietor. This was followed by the appointment of Perusahaan

Kejuruteraan Am Sdn Bhd, a company where the 1st and 2nd respondents and Hoy were shareholders. This arrangement of business outside that of API but yet associated with it personally was accepted by these three from the very beginning.

A

The Appellant

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[14] When API was incorporated and went into full production, the appellant was too young to be involved. Subsequently in 1996, he played a more active role in the company taking over much of what was done by his father. He became a director of API, with his father as an alternate, until he resigned in 2001.

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Industri Teknik Kita Sdn Bhd

[15] As disclosed. Malaysia Workshop was appointed a dealer of API. But this dealership was transferred to Industri Teknik Kita Sdn Bhd (ITK) which was controlled by the 1st and 2nd respondents. ITK did well and at one time was API's best dealer accounting for almost 70% of API's sales. Then around late 1998 and early 1999, the 1st and 2nd respondents disposed off their share-holdings in ITK to a third party. When the new owners of ITK terminated their agency with API and subsequently became a dealer for a competitor API's sales suffered substantially. Not only this, ITK was also indebted to AIM for up to RM804,932 for goods sold and delivered but yet to be paid. This amount took a while to recover but though it was fully repaid, the appellant took issue over this with the 1st and 2nd respondents.

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Syarikat Hup Guan Oxygen

[16] Similarly, the appellant complained that the 1st and 2nd respondents in control of API had not used their best endeavours to recover a sum of RM561,121 due from Syarikat Hup Guan Oxygen to API. The reason cited is because the proprietor of Syarikat Hup Guan Oxygen was a close friend of these respondents. But this has proved to be untrue with opinions from API's solicitors revealing that this firm had no assets and the proprietor, a man of straw.

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Acoxgas Sdn Bhd

[17] Sometime in early 1908, the 1st and 2nd respondents incorporated a company known as Acoxgas Sdn Bhd (Acoxgas). This company was set up to manufacture industrial gas in Tawau. According to the appellant, this company is in direct competition

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A with API and the 1st and 2nd respondents did not disclose their conflicting interest in this company to the board of directors of API until 10 April 2000.

B [18] The appellant also claimed that the 1st and 2nd respondents had devised an agenda to assist Acoxgas penetrate into the Sabah market at the expense of API. This was done by reducing the price of API's products under the pretext of an on-going price war with other competitors. With prices lowered, Acoxgas would be able to sell their goods in the market and compete with other suppliers.

C [19] Aside from the above, the appellant alleged that the 1st and 2nd respondents had allowed Acoxgas to use API's empty gas cylinders by filling them with Acoxgas products and selling them as Acoxgas products.

D [20] Finally, the appellant said that though Acoxgas is based in Tawau and API is in Sandakan, the entry of Acoxgas into the Tawau market would compete with API's appointed dealers in Tawau. This is detrimental to API.

E *Golden Harvest Enterprise*

F [21] Golden Harvest Enterprise was an appointed dealer of API in Tawau. They had used their own cylinders for API's gas and payment was made for these Supplies. The appellant was suspicious that the 1st and 2nd respondents had bought into Golden Harvest Enterprise with the intention of changing its principal to Acoxgas. This, however, has proved to be incorrect. The 1st and 2nd respondents had only bought Golden Harvest Enterprise's cylinders not its retail business.

G *Rejected Oxygen*

H [22] To maintain a high standard of quality in API's products, oxygen produced by API has to be at least 99.5% pure otherwise end-users, who are normally welders, would not be able to cut their metal with a clean and smooth edge. Oxygen below this degree of purity is considered rejected product by API. Whilst it can still be used for cutting metal it does so with a lesser degree of perfection. Therefore, such gas if not used is released into the atmosphere to evaporate. According to the 1st respondent, such rejected oxygen was given to Malaysia Workshop without charge as one of the perks for working without a salary in API. However, the appellant disputes this.

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Claim At RM400,000 By Malaysia Workshop

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[23] Animosity between the appellant and the 1st and 2nd respondents came to a head when Malaysia Workshop presented a bill to API for RM400,000 for repairs and services carried out by Malaysia Workshop for API. The appellant questioned the authenticity of this claim and refused to sign API's cheque for this amount made out to Malaysia Workshop. This forced the 1st and 2nd respondents, who are also signatories of all API's banking documents, to sign on this cheque and, indirectly, paid themselves.

B

Miscellaneous Matters

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[24] When relationship began to turn sour and open confrontation followed, Malaysia Workshop began to charge API for office rental of RM1,500 a month instead of, as previously, a mere token sum of RM200. Although API owns a factory, its office is located on the first floor of Malaysia Workshop. This was originally intended to save cost and to facilitate the 1st and 2nd respondents in carrying out their dual roles in running API and Malaysia Workshop with ease.

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[25] Then the 1st respondent, who had never received any remuneration before for running the daily affairs of API, demanded to be paid a monthly salary of RM8,000.

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[26] This was followed by the 2nd respondent who insisted that his salary should be increased from RM3,500 each month to RM5,000.

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[27] Aside from this, 1st and 2nd respondents had taken out insurance coverage for themselves for RM1 million each with premiums to be paid by API.

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[28] Following this, there was the purchase of a motor car by API for the 1st respondent.

[29] Furthermore, where API used to dump its industrial waste on the two adjacent pieces of land next to its factory which belong to a company controlled by the 1st and 2nd respondents for free, there was now a monthly charge.

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[30] All these demands by the 1st and 2nd respondents or their associates were opposed by the appellant at various API board meetings but the appellant was constantly outvoted by the 1st and 2nd respondents.

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A *Actions Of The Appellant*

[31] On 10 May 1999, with the assistance of a off-duty police officer and another, the appellant went to the premises of API and took away various documents which included API's machinery drawings, spare parts books, trouble-shooting operation and control manuals. Using some of these, he lodged a police report against the 1st and 2nd respondents for selling industrial gas to Malaysia Workshop without billing them. Though the appellant claimed to have subsequently returned these documents and drawings he was unable to identify the person in API who acknowledged receipt of them. The loss of such vital documents and drawings was a setback for API which required the 1st and 2nd respondents to reconstruct them in order to operate API's plant and business efficiently and effectively. For this, the 2nd respondent had to travel to China to meet with the designers of the machines that were supplied to API. As to the consequences of the lodged police report, after investigation the police preferred no charges against the 1st and 2nd respondents.

E *Financial Status Of API*

[32] Since inception until 2001, API had made hefty profits and paid out the following dividends to the three shareholders:

In 1995: RM1,142,857.14.

F In 1996: RM1,000,000.

In 1997 : RM1,900,000.

In 2002: RM1,620,948.

G **[33]** Throughout the years, API's annual financial accounts were never qualified by its auditor. But suddenly on 9 July 2006, the directors of API were presented with a heavily qualified financial report ending 28 February 1999 by its auditor (the brother-in-law of the appellant). This is rather strange not only because of its sudden appearance (because API's financial year did not end until 30 November 1999) but also because according to the 1st and 2nd respondents no one had ever asked for it. Using this set of qualified accounts, the appellant alleged that the 1st and 2nd respondents had mismanaged API.

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Appellant's Claim**A**

[34] Frustrated over his inability to rid the 1st and 2nd respondents as directors of API, and failing to convince them to buy over his shares in the company, the appellant launched this action against the respondents. He claimed that he, as a member of API, had been oppressed and his interest disregarded. Also he alleged that he was discriminated against or otherwise prejudiced by the acts of the 1st and 2nd respondents.

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[35] In his application he sought the following:

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1. A declaration that the 1st and 2nd respondents' appointments as directors of API are null and void.

2. A declaration that the following board resolutions of API:

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(a) to take out life insurance policies for the 1st and 2nd respondents;

(b) to pay the 1st respondent a salary of RM18,000 per month:

E

(c) to increase the salary of the 2nd respondent from RM3,500 per month to RM5,000;

(d) to sell its products to Malaysia Workshop at dealer's price;

(e) to approve the purchase of a motor car for the 1st respondent

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are null and void.

3. And upon granting of the above declarations, the 1st and 2nd respondents account to AIM for all the monies and benefits enjoyed by them.

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4. An order that the 1st respondent renders to API a complete account of all rejected gas supplied by API to Malaysia Workshop.

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5. That the 1st and 2nd respondents account to API for all the gas cylinders taken by Acoxgas from API and then compensate API for these.

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6. That the 1st and 2nd respondents account for all profits made by Acoxgas at the expense of API.

- A 7. That the 1st and 2nd respondents take personal responsibility to repay API for the debt, due and owing by Industri Teknik Kita Sdn Bhd and Syarikat Huat Guan Oxygen.
- B 8. That the 1st respondent repays API the sum of RM400,000 given to Malaysia Workshop.
9. That the 1st and 2nd respondents pay the appellant damages and costs.
10. And finally an order that API be wound up.

C

Finding Of The Trial Judge On The Law

- D [36] The first issue dealt with by the trial judge was whether this application of the appellant is founded on s. 181 or on that section together with s. 218 of the Companies Act. According to the trial judge, the appellant's claim is based on "a pot-pourri of complaints against the 1st and 2nd respondents consisting of acts representing a combination of matters under both s. 181 and 218 of the Act". Decidedly, the learned judge announced that this is not "a hybrid petition" but one that falls squarely under s. 181 of the Companies Act.

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- F [37] I am in full agreement with this finding. For a start, the intitlement did not mention or make reference to s. 218 of the Companies Act. It only specifies s. 181 of the Companies Act. Then in the affidavit of the appellant in support of this application, s. 181 of the Companies Act was repeatedly mentioned as the provision of the law to base his claim on. Nowhere is s. 218 of the Companies Act ever referred to. By this, I am of the view that the appellant must confine his claim within the ambit of s. 181 of the Companies Act rather than be permitted to expand his claim into some other provision of the law.

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- H [38] Once this is established, the trial judge proceeded to lay down the test to be applied in an application under s. 181 of the Companies Act. And correctly, he reproduced the relevant excerpts from the judgment of Lord Wilberforce in the *locus classicus* case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 2 MLJ 227 dealing with s. 181 of the Companies Act. It is as follows:

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Section 181(d) and (2) of the Malaysian Companies Act 1965, are as follows:

(1) Any member or holder of a debenture of a company or in the case of a declared company under Part IX, the Minister, may apply to the court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the court is of the opinion that either of such grounds is established the court may, with the view to bringing to an end or remedying the matters complained of make such order as it thinks fit and without prejudice to the generality of the foregoing the Order may:

(a) direct or prohibit any actor cancel or vary any transaction or resolution:

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of we shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

This section can trace its descent from section 210 of the United Kingdom Companies Act. 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is in important respects different from both its predecessors and is

- A notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In re H.R. Harmer Ltd*). It introduces a new ground in sub-section (1)(b) and, most
- B importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for “remedying the matters complained of” and states as a specific type of relief that of winding-up of the company. ...
- C Secondly, for the case to be brought within section 181(1)(a) at all, the complaint must identify and prove “oppression” or “disregard”. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who
- D take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions affair
- E play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd*): their Lordships would place the emphasis on “visible”. And similarly “disregard” involves something more than a failure to take account of the minority’s interest: there must be awareness of that interest and an evident decision to override it or brush it aside or
- F to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale*). Neither “oppression” nor “disregard” need be shown by a use of the majority’s voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable
- G point in time, can be held to have crossed the line ...
- H Their Lordships agree that the wording of the section (and the same is true of section 181(1)(a) relates to a present state of affairs: “are being conducted”, powers “are being exercised” are grammatically clear: the language may be contrasted with that of section 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by subsection (1)(a) is not particular acts but the manner in which affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be “oppressive” or “in disregard” even though a
- I particular objectionable act may have been remedied. ...

The remuneration of the Directors and of the Managing Director, which had been regularly voted and approved by the shareholders, was a matter for them and no case was made for interfering with their decision.

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[39] To elaborate further, the trial judge once again in my view correctly quoted a passage from a text by Walter Woon on Company Law 1988 which was adopted with approval by the High Court in Malaysia in *Re Tong Eng Sdn Bhd (Loh Loon Keng, Petitioner)* [1994] 1 MLJ 451 @ 457 which says:

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Section 216 (of the Companies Act of Singapore which is in *pari materia* with s. 181 of the Act) embodies a member's personal right to be treated fairly ...

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Mismanagement of the company does not necessarily constitute oppression or disregard of a member's interests: *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242. Nor, indeed, does the fact that a member is consistently outvoted mean that he is oppressed or that his interests are being disregarded. It should be remembered that the majority also has rights. Section 216 does not give jurisdiction to the court to interfere with the internal management of companies which are being managed honestly and in accordance with the law: *Re Bright Pine Mills Pty Ltd* [1969] VR 1002.

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Finding Of The Trial Judge On The Facts

[40] Though not entirely comprehensive but nevertheless sufficient, the trial judge proceeded to deal with the complaints of the appellant. I shall go through each of them, first disclosing the trial judge's findings, and then addressing the appellant's dissatisfaction over them as voiced in this appeal followed by my opinion.

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Acoxgas

[41] In respect of Acoxgas, the finding of the trial judge is:

The Petitioner has enumerated a host of acts and deeds attributed to the 1st and 2nd Defendants constituting conflicts of interest. I do not consider it necessary to subject them to critical scrutiny as these complaints relate to injury to the Company, not to the Petitioner as a member of the Company, which is clearly outside the purview of section 181 of the Act. It is incomprehensible how the Petitioner can be heard to complain about the 1st and 2nd Respondents in relation to Acoxgas Sdn Bhd when the petitioner has, together with his brother-in-law, one Ho Toh Chee, the

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- A Company's auditor, incorporated Tawau Oksigen Plant Sdn Bhd way back in 1989 to also manufacture industrial gas and oxygen in direct competition with the Company and it does not matter that Tawau Oxygen Plant Sdn Bhd has never been operational because what is sauce for the goose is also sauce for the gander.
- B It must also be remembered that from its early days the founding members including the Petitioner, each has, in one way or another, through different business entities, been in situations of conflict of interest in relation to the Company.
- [42]** On appeal, the appellant asserted the following:
- C 1. The incorporation of Tawau Oksigen Plant Sdn Bhd was never an issue. There was no complaint from the 1st and 2nd respondents about this company. In any event this company was never in operation.
- D 2. The 1st respondent has stated that the objective of setting up Acoxgas was to take over Industri Teknik Kita Sdn Bhd which the suspecting appellant believed would change its supplier from API to Acoxgas.
- E 3. Acoxgas has sold their products in areas covered by API's dealers, thus is in direct competition with API.
4. There was a plan by the 1st and 2nd respondents to use Acoxgas to take over the business of API.
- F 5. There is evidence that Acoxgas had secretly filled API's cylinders with Acoxgas products. There also existed a mutual arrangement designed by the 1st and 2nd respondents to allow API to fill Acoxgas cylinders in Sandakan while Acoxgas will do the same for API in Tawau. This was to assist
- G Acoxgas to penetrate into the Sandakan market.
6. Since the 1st and 2nd respondents had allowed API's cylinders to leave API's plant unaccounted for it is presumed that these were meant for Acoxgas' use.
- H 7. API has made losses for the years 1999, 2000 and 2001.
- [43]** According to the appellant, all these actions of the 1st and 2nd respondents "constitute a breach of fiduciary duty and conflict of interest amounting to oppression and/or fairness which
- I is a visible departure from the standard of fair dealing and violation of the conditions of fair play".

[44] Before I deal with these complaints, it is necessary to first state that Acoxgas, though involved in the manufacturing of the same products as API, is not based in Sandakan where API's plant, office and operation are located. It is in Tawau. A

[45] Secondly, when Acoxgas was incorporated, there was an offer by the 1st and 2nd respondents to Hoy, the father of the appellant, to participate as a shareholder in this company. But Hoy turned it down preferring instead to invest in the stock market. Thus, from the very beginning, there is no question of this company being secretly incorporated. B
C

[46] Thirdly, there is evidence to show that Acoxgas has from the start taken relevant precautions not to intrude into the established markets of API. Acoxgas had secured a list of API's dealers so that it would not entice or solicit API's business. D

[47] In fact API's business has been complemented by Acoxgas. To save transport charges for having to ferry API's cylinders back and forth to its only dealer in Tawau, Acoxgas has agreed to fill up API's cylinders with its own gas from its plant in Tawau at a very reasonable price. This arrangement is reciprocated by API for Acoxgas in Sandakan. And all these transactions were properly accounted and paid for by each party. Perhaps, because of this arrangement, the appellant is mistaken that Acoxgas were taking away API's cylinders for its own use. E

[48] On the allegation that the 1st and 2nd respondents had intended to use Acoxgas to take over the business of API, there is no evidence to support this. In fact, if Acoxgas had intended this, then there is no reason why the 1st and 2nd respondents disposed off their shareholdings in Industri Teknik Kita Sdn Bhd to a third party. F
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[49] No doubt there was a dip in the income of API for years ending 1999, 2000, and 2001 but there is no convincing evidence to attribute this to Acoxgas as a competitor. As disclosed by the 1st respondent, which reasons I find fair and reasonable, the drop in income was due to: the termination of Industri Teknik Kita Sdn Bhd as agent for API; a price war with its competitors at the material time which forced API to reduce the price of its products; the country's economic downturn, and finally the sabotage by the appellant in removing vital documents and drawings from API's H
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A plant. But it is very noticeable that soon after the appellant resigned as a director of API, the company bounced back to profitability.

B [50] Indeed the 1st and 2nd respondents did not formally disclose their interest in Acoxgas to API until 10 April 2000, but, as stated, things in this company were not run in a manner that took pains to comply with every formality required by law. This relaxed attitude is also reflected in the non-disclosure by the appellant of his interest in Tawau Oksigen Plant Sdn. Bhd. This double standard forced the trial judge to rebuke the appellant with: “what is sauce for the goose is also sauce for the gander”.

C [51] It is my view that it does not matter whether Tawau Oksigen Plant Sdn. Bhd. is not operational – rather, the fact remains that there was no formal disclosure of this to the directors of API, and this is the issue raised by the appellant against the 1st and 2nd respondents. From the business culture of the parties involved in API it was their practice to be separately engaged in other business of their own which may even conflict with that of API as long as they were honest with each other in their dealings. D Before the entry of the appellant into API this practice went on smoothly. API made profits for them and there was no quarrel among themselves. But the moment this fundamental trust was questioned and when one party started to dig into the affairs of the other then this entire culture collapsed. Now to accuse the E 1st and 2nd respondents of impropriety and lack of fair play is in my view totally unfair and unacceptable especially when there is no cogent evidence to support this claim. F

G *Free Supply Of Rejected Industrial Gas*

G [52] The learned trial judge’s finding on the issue that Malaysia Workshop had been utilizing API’s rejected industrial gas and not paying for it is as follows:

H The Petitioner begrudges the fuel that the 1st Respondent has been obtaining from the Company a free supply of industrial gas which is of no commercial value to the Company and otherwise released to the atmosphere, an attitude aptly characterized by learned counsel for the 1st and 2nd Respondents as that of a dog in the manger.

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[53] Now on appeal the appellant repeats this same accusation against the 1st respondent and adds that the free use of this rejected product was not disclosed to the appellant until the appellant inquired with the 1st respondent at a meeting.

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[54] The 1st respondent has insisted in his testimony that for his *de bono* services to API, the directors of API (ie, besides himself, the 2nd respondent and Hoy) had agreed to allow him to channel this rejected gas to Malaysia Workshop for free. As did the trial judge, I find this claim justified, particularly when this gas has no commercial value to API. If it is not given to Malaysia Workshop, then API would have released it into the atmosphere to evaporate. So how can this be viewed as oppressive to the appellant or that his interest was disregarded, and he being discriminated against and prejudiced?

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Payment Of RM400,000 To Malaysia Workshop

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[55] On the appellant's grievances over the payment of RM400,000 to Malaysia Workshop the trial judge has this to say:

There is also allegation of an irregular payment of RM400,000 claimed by and paid to Malaysia Workshop by the Company. In my judgment this does not amount to conduct of the oppressive of the Petitioner because there is nothing sinister about this payment. The cheque for the payment was sent to the Petitioner the particulars of which were also given to him by one Miss Chong upon his request and more importantly, the Company's Auditor did not make any adverse finding in relation to the payment. In short, the petitioner's allegation is unfounded.

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[56] Still insisting that the payment of RM400,000 to Malaysia Workshop is unsupported by convincing evidence to justify it, the appellant pointed out that the bills tendered by Malaysia Workshop for this claim do not correspond with the scope of work approved by the board of API.

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[57] I have examined the board minutes of API referred to by the appellant and the bills tendered by Malaysia Workshop. Indeed some of these bills do not correspond with the jobs as minuted by the API board. But nowhere did Malaysia Workshop ever state that these bills were only for jobs stated in the minutes. These bills were for all works that were duly rendered by Malaysia Workshop for API and this included, for example in bill dated 20 August 1998, "transport charges for 76 empty cylinders from Tawau to Sandakan" and "transport charges for 481 empty

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A cylinders from K.K. to Sandakan” amounting to RM2,850.70. Such services were never disputed by the appellant as having been rendered nor those stated in other bills for materials and services other than those mentioned in the minutes. As these bills were legitimate they ought to be paid.

B *Price War Allegedly To Benefit Acoxgas*

C [58] The appellant has alleged that the 1st and 2nd respondents had reduced the price of API’s products around April 1998 under the pretext of a price war with other competitors in order to assist Acoxgas penetrate the Sabah market by selling its products cheap.

[59] On this issue the trial judge makes this finding:

D How this is so, defies logic, because conceivably it would have been more difficult for Acoxgas Sdn Bhd being a recent player to penetrate the market if prices offered by long-established manufacturers like the Company were low as it would have deprived Acoxgas the opportunity to sell its products by undercutting the established manufacturers. I find it rather

E inscrutable that the Company suffered loss as a result of the reduction in prices and in any event, this contention by the Petitioner is unsupported by evidence.

F [60] I share the same sentiments as expressed by the trial judge. This accusation does not make sense. How can a price war, in an even playing field, benefit any particular manufacturer of the same product? I would have thought the only people who benefited from this would be the consumers. Every manufacturer has its own basic cost to produce its product. One cannot escape

G from this. In a price war among competitors it is my view that one manufacturer would be better off than the other if its manufacturing cost is lower than his competitor’s. Unless there is proof to substantiate this, rather than just a mere comment by the appellant that Acoxgas had produced its product at a lower cost

H than API or other manufacturers of the same product, then this accusation of the appellant cannot be sustained. Then one must not overlook the ability of financially stronger competitors to withstand long periods of price reduction in order to kill off their competitors who are financially weaker despite the fact that they

I themselves are losing money. So, there are many factors to consider in a free market situation before one can say that Acoxgas has benefited from this price war. And in the absence of

a conclusive study that despite these influencing factors Acoxgas has benefited from this situation, I do not think that the appellant has proved this point against these respondents. Besides, the 1st respondent has given elaborate detail of why this policy of price reduction was practised: it was necessary for API to maintain its market share if API wished to compete with other producers who were dropping their prices. I accept this as a logical explanation and I find that there was nothing sinister about this move by the 1st and 2nd respondents, it was just a marketing strategy and policy adopted by API.

API Board Resolutions Passed

[61] The appellant's next complaint is that the 1st and 2nd respondents passed hoard resolutions in API despite his protest and objection. These relate principally to the following:

1. The introduction of salary for the 1st respondent and the increase in the pay for the 2nd respondent.
2. The purchase of a motor vehicle for the 1st respondent.
3. The purchase of insurance policies for the 1st and 2nd respondents.
4. The increase in rental by Malaysia Workshop for the office space occupied by API.
5. The charging of rent for the dump site.

[62] According to the appellant, since the 1st and 2nd respondents have personal interest in these matters, by voting in favour of them the 1st and 2nd respondents have breached their fiduciary duty to act in the best interests of API.

[63] Over this, the trial judge has this to comment:

It is painfully apparent that the foregoing instances encompass matters ranging from those that can properly be described as trivial to matters that clearly relate to the management of the affairs of the Company. Applying the principles set out in *Re: Kong Thai Sawmill And Re Tong Eng Sdn Bhd (supra)*. I am of the view that those acts do not constitute oppression and further support for this can be found in the judgment of Mohd Ghazali J (as he then was) in *Dato' Toh Klan Chuan v. Swee Construction And Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730 at p 748 ...

- A I have, without any disrespect to learned counsel for the Petitioner, considered it rather unnecessary to deal at length with the extensive submission on matters relating to alleged breaches or fiduciary duty by the 1st and 2nd Respondents. This is because I do not think they are of any relevance in that the 1st and 2nd
- B Respondents are not only directors but shareholders of the Company and their combined shareholding of 60% give them the majority voting power. In these circumstances, the 1st and 2nd Respondents do not owe any duty to the Petitioner as to how they exercise their votes.
- C **[64]** Still insisting that the 1st and 2nd respondents had not acted *bona fide* in passing these resolutions the appellant insisted that “majority rule (in API has) passes over into rule oppressive of the minority”, and done purposely to retaliate against the many queries raised by the appellant on the impropriety of the 1st and 2nd
- D respondents in handling the affairs of API.
- E **[65]** I am of the view that indeed the resolutions passed on the principal matters referred to above were in retaliation to the acts of the appellant. But I do not think that they were done *mala fide*. From the inception of API up to the time when the appellant participated in the affairs of the company the working relationship of the then directors was cordial, relaxed and casual. And this had worked out well for all as can be seen from the profitable returns of API. In this spirit of give and take, many things were carried out either free of charge or below cost. For example, why should
- F the 1st respondent take on the management of API for free and even without a car provided by the company to go about the company’s business? Or for that matter, the 2nd respondent’s remuneration being lower than the prevailing market value for his position? Then, who would be prepared to allow industrial waste to be dumped on his land without charge or his office be rented out at a nominal fee? Such sacrifices could only come about when there is an attitude of give and take. But when the appellant began to upset this norm and, worse, to question the integrity and probity of these respondents when they were honest and truthful
- G and had faithfully contributed to the company, then it is only natural that they retaliate by claiming and charging whatever that is rightfully due to them. This is legitimate and, like the trial judge, I do not think that the acts of these respondents constituted
- H oppression.
- I

[66] As to the appellant's claim of there being a breach of fiduciary duty, I find this absurd. As correctly pointed out by the trial judge, the 1st and 2nd respondents are substantial shareholders and are directors of API. They owe no fiduciary duty to the appellant in exercising their vote at board meetings and as shareholders they owe no duty to anybody as to how they exercise their vote (*Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393). And the "mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority (*Re Harmer Ltd* [1959] WLR 62 at p 87 per Romer LJ) accepted in *Dato Toh Kian Chuan v. Swee Construction & Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730.

The Financial Status Of API

[67] The trial judge has made an observation towards the end of his judgment to indicate that API is in a "robust and healthy state as shown in the audited accounts". The appellant before us disputed this claim. He disclosed API's losses for the following periods:

As at 30 November 1999 a sum of RM302,811.

As at 30 November 2000 a sum of RM178,855.

As at 30 November 2001 a sum of RM14,744.

As at 30 November 2002 a sum of RM654,295.

But in the year 2003 a profit of RM391,439.

[68] But these losses, aside from other factors which I shall be discussing later, are largely contributed to by the acts of the appellant who persistently upset the management with demands and inquiries, and then removed, without authority and for no apparent reason except, in my view, to sabotage the operation of API, vital drawings and documents necessary to operate API's plant. He then used some of these as a basis to lodge a police report implicating the 1st and 2nd respondents which later turned out to be unsubstantiated when no criminal charge was ever

- A preferred against the 1st or 2nd respondents. Further, having admitted to taking away such documents and drawings, the appellant could not convincingly account for their return to API resulting in the 2nd respondent having to travel overseas to source for them in order to avoid any major disruption in the company's
- B production system. These loathsome activities had disrupted the smooth running of the company and instead of concentrating on maintaining profitability and improving productivity, the energy of the directors was diverted to entertaining internal squabbles caused by the appellant. These had severe consequences on the
- C business of the company. But upon the resignation of the appellant as director of the company in 2001, the profit of the company returned and this is well reflected in API's account for 2003. So the losses for the periods stated, in my view, are to a very large extent contributed to by the actions of the appellant.
- D When this is a fact, then the appellant cannot now turn around and blame the 1st and 2nd respondents.

[69] Other contributing factors to the losses, as disclosed by the 1st respondent, are as follow:

- E 1. Industri Teknik Kita Sdn Bhd, the biggest and best performing dealer of API, terminated their dealership with API and moved over to a competitor. The company needed time to build up new and existing dealers to fill this vacuum.
- F 2. When Industri Teknik Kita Sdn Bhd terminated their dealership there was a debt of over RM804,932 due and owing by this company to API. It took a while for API to fully recover this sum.
- G 3. There was the price war among competitors in the trade and this has cut into the profit margin of the company.
4. There was the economic downturn which affected most business in the country and API was not spared.
- H **[70]** These, to my mind, are legitimate reasons where no fault can be attributed to the 1st and 2nd respondents as executive directors of API, least of all utilizing their position to oppress the appellant, disregard his interest as well as to discriminate against or otherwise prejudice him.
- I

Other Accusations

[71] Towards the end of his submission, counsel for the appellant has accused the learned trial judge of not taking into consideration the fact that mutual confidence among the appellant and the 1st and 2nd respondents and the substratum of API have broken down warranting either API be wound-up or the 1st and 2nd respondents be ordered to buy the appellant's share at market price.

[72] Though I believe that the appellant has lost confidence with the 1st and 2nd respondents and *vice versa* I am of the opinion that the substratum of the company is still intact. The company continues to operate as an entity separate and distinct from its shareholders. As an ongoing profitable enterprise there is no reason why the court should order it to be wound-up or force one shareholder to buy out the other just because one does not like the other. Without the appellant as a director, API is, relatively speaking, well managed and this is manifested by the rather substantial dividends dished out from time to time to shareholders for their investments. Under these circumstances there is no justifiable reason why the court in exercising its judicial discretion, based on just and equitable rule, should accede to the demands of the appellant particularly when there is cogent evidence that he did not come with clean hands – see *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492 @ 507.

Conclusion

[73] For reasons as stated above the appellant's appeal was dismissed with costs and his deposit for this appeal ordered to be paid towards the account of taxed costs.

[74] These grounds of judgment have the concurrence of my learned brothers, Abdul Aziz Mohamad, JCA (now FCJ) and Zulkefli Ahmad Makinudin, JCA.

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